



IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No. 78-85

DAVID B. BOONE, ET AL, *Petitioners*

v.

J. M. McKEE, ET AL, *Respondents*

PETITIONERS' SUPPLEMENTAL BRIEF

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The response places squarely before this Court the identical issues raised below: Does the due process clause of the Fourteenth Amendment render denial to petitioners of their right to Arkansas counsel presumptively prejudicial and, if not, was the harmless error standard applied by the Court below constitutionally appropriate?

As was the case before the Arkansas Supreme Court¹ respondents, without citation to any direct authority,²

¹ After extensively briefing the *Powell-Chandler-Holloway* line of decisions (on appeal and in two motions for rehearing), petitioners' received an analysis by the lower court identical to that written by it in *Holloway v. Arkansas*, 539 S.W.2d 435, 441 (Ark. 1976), *rev'd*, 98 S. Ct. 1173 (1978).

² Respondents seek to distinguish, among other cases, *Powell* and *Holloway* on the theory that non-resident counsel was present in

save that of Arkansas, contend that the "harmless error" standard applied by the lower court is constitutionally palatable. The basic fallacy behind this reasoning has been spoken to time and again by this Court in its *Powell* line of decisions.³ As stated in an intervening decision by the District of Columbia Court of Appeals:

The government contends that even assuming the court erred in removing appellant's court-appointed attorney reversal is not required since appellant eventually received a competent defense through substituted counsel. *We think it irrelevant that substitute counsel has not been shown to have performed ineptly. The claimed deprivation is an arbitrary infringement on the right to assistance of counsel and interference with the attorney-client relationship, not a claim of ineffective assistance of counsel. Reversal is required even though no prejudice is shown. [Harling v. United States, slip op. 10-11 (No. 11719, D.C. Cir. June 21, 1978) (Emphasis added.)]*

The writ should issue.

the instant case, *i.e.*, there was no absolute denial of counsel. In *Powell* however, the presence of presumably adequate out-of-state counsel played no part in the Court's analysis. With respect to *Holloway* the presence of Arkansas counsel was deemed insufficient to circumvent the basic proposition that any arbitrary infringement on the right to counsel is among those "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." 98 S. Ct. at 1175.

³ See *Petition for Writ of Certiorari* 4-9.

Respectfully submitted,

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